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State of New York Public Employment Relations Board Decisions from June 19, 1996

New York State Public Employment Relations Board

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Keywords

NY, NYS, New York State, PERB, Public Employment Relations Board, board decisions, labor disputes, labor relations

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ERIE COUNTY SHERIFF'S POLICE BENEVOLENT ASSOCIATION,

Petitioner,

-and-

CASE NO. C-4267

COUNTY OF ERIE and SHERIFF OF ERIE COUNTY,

Joint Employer,

-and-

TEAMSTERS, LOCAL 264,

Intervenor.

GLEASON, DUNN, WALSH & O'SHEA (RONALD G. DUNN of counsel), for Petitioner

MICHAEL A. CONNORS, ESQ., for Joint Employer

RONALD L. JAROS, ESQ., for Intervenor

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Erie County Sheriff's Police Benevolent Association (PBA) to a decision by the Director of Public Employment Practices and Representation (Director) on the PBA's petition to fragment deputy sheriffs - criminal from a unit of all Sheriff's department employees[1/] of

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[1/]The existing unit includes employees in the titles of deputy sheriff - criminal, who are primarily responsible for law enforcement generally, and deputy sheriff - officer, who are primarily responsible for the care and custody of inmates, for security in the courts and other buildings or for civil functions. There are other employees in nondeputy positions who provide various administrative, clerical or medical support services.

the County of Erie and the Sheriff of Erie County (Joint Employer), which is currently represented by the Teamsters, Local 264 (Local 264).

After a multi-day hearing, the Director dismissed the petition. Although viewing our decision in County of Dutchess and Dutchess County Sheriff[2/] (hereafter Dutchess) to suggest the appropriateness of a separate unit for those deputy sheriffs who have general law enforcement duties, the Director read Dutchess to require the demonstration of a law enforcement community of interest unique to the class of deputy sheriffs subject to the petition.[3/] The Director concluded that he could not clearly differentiate the law enforcement duties of the deputy sheriffs - criminal from those of the deputy sheriffs - officer, primarily due to the building security services provided by the latter group. He concluded that employees in both titles, all police officers under the Criminal Procedure Law (CPL), engage in the types of law enforcement work usually associated with the job of a police officer. As the PBA did not seek

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[2/]26 PERB ¶3069 (1993).

[3/]After his decision in this case, the Director granted a petition to fragment road patrol deputy sheriffs from an existing sheriff's department unit in circumstances demonstrating a distinct law enforcement community of interest and in which the employer did not oppose the fragmentation. Orleans County and Orleans County Sheriff's Dep't, 29 PERB ¶4015 (1996).

fragmentation on any basis other than a unique law enforcement community of interest,[4/] the Director dismissed the petition.

The PBA argues in its exceptions that the deputy sheriffs - criminal are the only police officers in the Sheriff's department who can be and are involved regularly in criminal law enforcement activities. The PBA interprets Dutchess to authorize and require separate units for those deputy sheriffs who are police officers appointed pursuant to examination for such position under the Civil Service Law (CSL). As the deputy sheriffs who are the subject of its petition are the only police officers appointed to a police officer position pursuant to civil service examination, and the only ones who can and do "routinely" perform criminal law enforcement duties, the PBA argues that the Director made a "fundamental error" in dismissing its petition. The PBA argues, moreover, that the Director disregarded or discounted other evidence establishing the unique police community of interest possessed by the deputy sheriffs - criminal, one not shared by any employees in the deputy sheriff - officer title series.

The Joint Employer and Local 264 have opposed the petition throughout the representation proceedings and each argues that the Director's dismissal of the petition was correct on the law and facts.

[4/]Two petitions seeking fragmentation of the deputy sheriffs - criminal on the basis of alleged conflict of interest and inadequate representation by Local 264 were dismissed in earlier proceedings. County of Erie and Erie County Sheriff, 25 PERB ¶3062 (1992) and 22 PERB ¶3055 (1989). As noted, those claims are not repeated under this petition.

The Joint Employer argues that it is not whether a deputy sheriff took a civil service police officer examination which is or should be dispositive of a fragmentation petition. It reads Dutchess to focus on the job duties performed by the deputy sheriffs and it argues that, as the Director recognized, there is a significant overlap in traditional law enforcement duties between those in the deputy sheriff - criminal title and those in the deputy sheriff - officer title. Urging restraint in the application of whatever "new" fragmentation standard there may be in Dutchess to avoid the overfragmentation of functioning units, the Joint Employer argues that the record fully warrants a continuation of the long-standing Sheriff's department unit.

Local 264 echoes the Joint Employer's position that deputy sheriff - officers also perform traditional police work, most notably those deputies who are assigned to courthouse and other building security. Emphasizing also its belief that the duties performed are the focus of inquiry under Dutchess, Local 264 argues that the admitted differences in the current qualifications and job training between deputy sheriff - officer and deputy sheriff - criminal should not be dispositive of the uniting question raised by the PBA's petition.

Having reviewed the record and considered the parties' arguments, including those at oral argument, we reverse the Director's decision and remand the case for further processing.

Until Dutchess, the Board's decisions involving petitions seeking to fragment existing units of deputy sheriffs were analyzed under fragmentation standards applicable to public employees generally. The decisions reflected the belief that all deputy sheriffs, regardless of title, qualifications, training or duties, share a community of interest based upon a commitment to law enforcement generally. Therefore, to warrant a fragmentation of a sheriff's department unit, there had to be shown, just as for other units, a compelling need to fragment, one usually based upon a demonstrated conflict of interest or a history of inadequate representation. As evidenced by the denial of the two earlier petitions to fragment these deputy sheriffs - criminal, such petitions were routinely denied.[5/]

That general fragmentation standard, however, has never been applied in cases involving police officers of municipal police departments. As early as 1977, the Board, in City of Amsterdam[6/] (hereafter Amsterdam), fragmented police officers from a unit which also included fire fighters despite the absence of any evidence demonstrating a conflict of interest or inadequate representation. The Board recognized then that police officers are "fundamentally different from everyone else" - even fire fighters who share the same statutory impasse procedures -

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[5/]In addition to the two cases involving this Joint Employer see County of Warren, 21 PERB ¶3037 (1988); County of Albany and Albany County Sheriff, 19 PERB ¶3054 (1986) and 15 PERB ¶3008 (1982); and County of Rockland, 11 PERB ¶3050 (1978).

[6/]10 PERB ¶3031 (1977).

"in ways that affect the essence of their labor relations".[7/] In further explaining in Amsterdam why the fragmentation of police officers was warranted, the Board observed that "the police service is concerned with the broad spectrum of human rights, public order, and the protection of life and property".[8/] It was, therefore, the police officers' responsibility for criminal law enforcement which persuaded the Board in Amsterdam of the appropriateness of a separate unit for such officers, even if the grant of a separate unit necessitated the fragmentation of an existing public safety unit.

Dutchess involved a fragmentation petition grounded upon alleged inadequate representation of deputy sheriffs by the incumbent union. Although affirming the Director's determination that the ground asserted for fragmentation was not established, we remanded the petition to the Director for a further investigation, noting that there was little in the record regarding "the civil service classifications, distinct duties, responsibilities and working conditions of the deputy sheriffs and other employees of the Joint Employer".[9/] We concluded upon "reconsideration of our fragmentation decisions regarding sheriff's department personnel", that "[t]he law enforcement duties of deputy sheriffs may justify a separate bargaining unit

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[7/] Id. at 3061.

[8/] Id., quoting W.F. Danielson, Personnel Report No. 64 (Public Personnel Ass'n).

[9/] 26 PERB ¶3069, at 3130.

for them based upon an arguable unique community of interest and/or actual or potential conflict of interest with other employees in the Sheriff's Department who may not have any similar duties."[10/] As Dutchess was settled after the remand, no subsequent decision was issued. This case, therefore, is our first opportunity to consider Dutchess after its release.

The meaning of Dutchess can be ascertained from the remand itself and our reliance on Amsterdam. Dutchess at its simplest represents our realization that deputy sheriffs cannot reasonably be looked upon as a generic group without separate identities and interests. Within the ranks of sheriff's department personnel are often deputy sheriffs whose sole function is criminal law enforcement; other deputies who have law enforcement as their primary, albeit not exclusive, function; still other deputies who do not regularly carry out law enforcement functions but do so occasionally; and, lastly, those, whether or not deputed, who perform none of what may be fairly considered traditional law enforcement activities. Dutchess, moreover, is an expression of our willingness to treat the uniting of deputy sheriffs in the same manner we have always treated the uniting of other police officers.

The real focus of the parties' debate and our own deliberation is not so much over the meaning of Dutchess as it is over its proper application. The argument is centered upon the

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[10/] Id.

following question: Which of the deputy sheriffs, if any, should be fragmented?

The PBA argues that Dutchess created a "bright line litmus test" for the fragmentation of deputy sheriffs from existing sheriffs' department units. According to the PBA, only those deputy sheriffs who have taken a police officer examination under the CSL should be fragmented as of right from an existing departmental unit because only those deputies can or do perform a full range of criminal law enforcement activities.

As much as we might like such a bright line test for ease of application, we must conclude that there was no such test articulated in Dutchess. Nor do we believe that the test the PBA proposes for our reaffirmation or adoption here is feasible.

Police officers who have been appointed to their position pursuant to a civil service examination can and do regularly perform criminal law enforcement duties. That is alleged by the PBA, clearly established by the record, and admitted by the Joint Employer and Local 264. We see no difference between this class of deputy sheriff and any municipal police officer which would have any relevance to a unit determination. However, simply because CSL deputy sheriffs are engaged in criminal law enforcement does not mean that other deputy sheriffs are not and cannot be so engaged. All deputy sheriffs in counties outside New York City, including the deputy sheriff - criminal and deputy sheriff - officer titles in this case, are police officers under the CPL and it is that law, in the main, which defines their

police powers. Moreover, as the Director found, and as the record again establishes, some employees in the deputy sheriff - officer title can and do engage in limited criminal law enforcement activities from time to time. From this, it should be readily apparent that any fragmentation to be ordered cannot be based reasonably simply upon a job title or a method of appointment.

Our rejection of the PBA's proposed "test" does not mean, however, that the CSL is immaterial to our analysis. To the contrary, the definition of police officer in CSL §58(3), with one additional condition, defines the class of deputy sheriff that we considered for possible fragmentation from an existing sheriff's department unit under Dutchess. As defined in the CSL, a police officer is one who is "responsible for the prevention and detection of crime and the enforcement of the general criminal laws of the state". To that basic CSL definition, we add a requirement for purposes of determining the most appropriate unit under the Act that those duties as defined be the exclusive or primary characteristic of the deputy sheriff position. It is only that class of deputy sheriff which we believe is concerned with, in the words of Amsterdam, "the broad spectrum of human rights, public order and the protection of life and property".

In this case, only those employees in the deputy sheriff - criminal title series meet that standard. Although deputy sheriff - officers do perform criminal law enforcement duties on

a limited basis from time to time, all employees in the deputy sheriff - officer title have as the primary characteristic of their employment either responsibility for building security, the care and custody of inmates, or the service of civil process and other civil functions. Deputy sheriff - officers are not, for purposes relevant to statutory uniting,[11/] engaged exclusively or primarily in the prevention and detection of crime and the enforcement of the general criminal laws of the State.[12/]

The "line blurring" emphasized by the Director as the basis for the denial of this petition was premised upon the deputy sheriff - officers' occasional involvement in criminal law enforcement pursuant to their police officer status and powers under the CPL. But the occasional performance of criminal law enforcement duties by some deputy sheriff - officers is no basis to fragment them from the existing unit nor can it be used to deny fragmentation to the deputy sheriffs - criminal who are or can be regularly exposed to that type of law enforcement by virtue of their status, qualifications and required training.

[11/]We express no opinion as to whether any deputy sheriffs - officer can be considered to be engaged in criminal law enforcement to any degree for any other purpose. Those are issues not within our jurisdiction and the answer to the question would depend upon factors other than the uniting criteria in the Act as applied.

[12/]In Orleans County and Orleans County Sheriff's Dep't, supra, note 2, the Director stated that "court security or similar duties . . . fall within the rubric of 'law enforcement'". We do not agree with this statement to the extent it is inconsistent with our decision in this case.

We realize, of course, as the Joint Employer points out in its brief, that even within the deputy sheriff - criminal title series, the degree of involvement with criminal law enforcement activities will vary by individual according to their area of assignment at any given time. That circumstance is equally true, however, among the police officer members of municipal police departments. The uniting standard articulated in this case produces a unit which we consider to be entirely in keeping with our prevailing practice regarding all other police officers. The unit we fashion consists of those in the police services division of the sheriff's department and includes road patrol officers, detectives, supervisory personnel, and others providing ancillary services which are directly and predominantly related to criminal law enforcement. These deputy sheriffs - criminal alone share the community of interest growing out of the qualifications, training and duties unique to a police officer who is responsible for the prevention and detection of crime under the general criminal laws of the State.

The fundamental differences between those deputy sheriffs whose predominant duties are in criminal law enforcement and all other deputies is shown throughout the record and in the uncontested findings made by the Director, which warrant no repetition here. These are differences acknowledged by the Sheriff, reflected in the rules and regulations of the department, and emphasized in separate career ladders, and significantly different job qualifications, job descriptions and

training requirements, which are again described in detail in the Director's decision. Even though many of these subjects would be beyond the scope of compulsory negotiation, they underscore the differences between the two basic deputy titles and confirm that it is only the deputy sheriff - criminal who has and can have criminal law enforcement as the exclusive or primary attribute of his or her employment. The deputy sheriff - officers are simply not qualified, and are not expected by this Joint Employer to be qualified, whether by education, training or otherwise, to perform the full range of law enforcement work which all deputy sheriffs - criminal are qualified to do.

Only two additional issues raised by the Joint Employer and Local 264 remain for discussion.

In Amsterdam, the Board held that the City's administrative convenience, as articulated by its mayor, but contrary to the position articulated by its legislative body, favored fragmentation of the police officers from the existing unit. The Joint Employer in this case has consistently articulated its opposition to the fragmentation of the deputy sheriffs - criminal, maintaining that it will destroy years of planning designed to maximize the utilization of personnel.

Although administrative convenience is a factor to be considered in making a unit determination, it is not dispositive. We are unable to discern anything in the fragmentation of the deputy sheriff - criminal title series from the existing unit which would necessarily produce the effects envisioned by the

Joint Employer. The mere possibility, even likelihood, that there will be some labor relations or personnel issues created as a result of the fragmentation of the deputy sheriffs - criminal is not a reason to deny them what is otherwise clearly the most appropriate unit in view of the "strong prevailing practice of having separate units for policemen".[13/]

We are also mindful of both the Joint Employer's and Local 264's argument that any fragmentation ordered in this case cannot be confined logically to deputy sheriff personnel and will lead inexorably to similar requests by any other employees who can reasonably claim some unique community of interest. We will decide such issues as appropriate should they arise in the future. However, nothing in this decision is intended to hold or suggest that we are abandoning our fragmentation standards generally. By this decision, we are simply giving effect to a uniting principle first articulated almost twenty years ago which is confined in its implications to police officers who are "fundamentally different from everyone else." If we afford to municipal police officers units separate from all other employees, we cannot do differently for those deputy sheriffs who are identically situated to those police officers in all relevant respects.

For the reasons set forth above, we find the following unit to be most appropriate:

[13/]Amsterdam, supra, at 3062.

Included: Full-time employees of the Joint Employer in the following titles: deputy sheriff - criminal; deputy sheriff - criminal (Spanish speaking); deputy sheriff - criminal (Seneca speaking); undercover narcotics deputy; detective deputy; detective deputy arson; technical sergeant; sergeant - criminal; training director; senior detective narcotics; coordinator - domestic violence; lieutenant - criminal; captain - criminal.

Excluded: All other employees of the Joint Employer

The unit we have defined as most appropriate may or may not include those deputy sheriffs who constitute the so-called "Rath Patrol".[14/] These are deputy sheriffs who provide a police presence at social services buildings in Erie County. These officers were ordered reclassified and were made members of the Joint Employer's Criminal Division by decision of the Appellate Division, Fourth Department.[15/] We are unclear, however, whether and to what extent the Rath Patrol deputies are criminal deputies and, more importantly, whether they have the qualifications and training which would permit them to be assigned the general law enforcement duties of a deputy sheriff - criminal. If they are fully qualified and empowered to perform criminal law enforcement duties, then their assignment to a building security detail would not warrant their exclusion from the unit. As the present record does not afford us a basis to make an informed judgment regarding the uniting of the Rath

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[14/]The Director did not address this issue because he dismissed the petition.

[15/]Ryan v. Slisz, 206 A.D.2d 877 (4th Dep't 1994).

Patrol, the case is remanded to the Director for investigation and decision, as necessary, on that limited issue.

The case is hereby remanded to the Director for further processing consistent with the terms of this decision. SO ORDERED.

DATED: June 19, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SUZANNE NOVAK,

Charging Party,

-and- **CASE NO. U-15686**

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,

Respondent.

ROBERT E. KUHN, for Charging Party

NANCY E. HOFFMAN, GENERAL COUNSEL (MARILYN S. DYMOND of counsel), for Respondent

BOARD DECISION AND ORDER

This matter comes to us on exceptions filed by Suzanne Novak to a decision by the Director of Public Employment Practices and Representation (Director) dismissing, as deficient, her charge against the Civil Service Employees Association, Inc. (CSEA). The charge alleges that CSEA breached its duty of fair representation in violation of §209-a.2(c) of the Public Employees' Fair Employment Act (Act) by refusing to pursue to step III a grievance alleging a violation of Article 22.2 of the contract between CSEA and her employer, the State of New York (Office for the Aging) and by "apparently never" pursuing an out-of-title work grievance under Article 24 of that contract and by not responding to her inquiries regarding that second grievance.

The Director notified Novak that her charge was deficient in most respects. Novak amended the charge in response to that notice of deficiency. The Director processed the charge as amended only as to CSEA's alleged failure to respond to inquiries about the out-of-title work grievance because he determined that the other allegations remained deficient. At a hearing on December 7, 1995, Novak withdrew the one aspect of her charge which was being processed, but she reiterated her objection to the Director's determination that the other aspects of her charge did not set forth a violation of the Act and she requested a decision regarding that deficiency determination.

The Director dismissed the charge pertaining to the Article 22.2 grievance because there were no allegations which would evidence that the decision not to appeal from the step II grievance determination was arbitrary, discriminatory or in bad faith. The decision not to appeal was made by CSEA's Assistant Contract Administrator because she determined that "management's error" regarding a "departmental promotion", which was rescinded pursuant to a decision by the Civil Service Commission not to reclassify Novak's position, was not a "violation of the union contract".

The charge pertaining to the Article 24 grievance was dismissed by the Director because there were no facts alleged in the charge as filed or as amended which would show that the grievance was "apparently never pursued". No exceptions have

been filed to the Director's dismissal of the allegations in this respect.

Novak argues in her exceptions that she was not informed as to the nature of the deficiencies in her charge; that she was led to believe that she would be able to argue the deficiencies at the December 7, 1995 hearing before "the full board"; that she was prevented from amending her charge due to PERB's "lack of response" and that CSEA was required under the Act to appeal the Article 22.2 grievance.

CSEA argues in response that the Director's decision is correct and should be affirmed.

Having reviewed the record and considered the parties' arguments, we affirm the Director's decision.

Novak's first three cited exceptions concern allegations of case processing errors committed by PERB staff. The record, however, contains no evidence in support of those allegations; to the contrary, it refutes them. Novak's attorney of record was informed by letter dated June 13, 1994, from the Assistant Director of Public Employment Practices and Representation (Assistant Director), as to the specific nature of the deficiencies in the charge as filed. Also, and again contrary to the allegations in the exceptions, Novak was permitted to file an amendment to the charge in response to the Assistant Director's notice of deficiency. As to the allegedly misleading conduct, nothing in the correspondence issued by agency staff to the parties or any comments made by the assigned Administrative Law

Judge (ALJ) at the hearing could have led Novak to believe that the noted deficiencies would be the subject of a hearing before us. The Assistant Director's August 2, 1994 letter to Novak's attorney states specifically that the charge "is being processed only as to the allegations . . . relating to CSEA's failure to provide information on Ms. Novak's Article 24 grievance". The limited extent to which the charge was being processed was reiterated by another letter from the Assistant Director dated August 26, 1994, and in two letters from the assigned ALJ, the first dated December 29, 1994, and the second February 27, 1995. Other letters establish that Novak was fully aware of the Director's deficiency determinations, that she objected to them and that she expected a decision from the Director on the noted deficiencies.

The sole substantive aspect of the exceptions concerns CSEA's decision not to appeal the Article 22.2 grievance. As alleged by Novak, Article 22.2 provides that a permanent employee will not suffer a reduction in salary as a result of a reclassification or reallocation of the employee's permanent position. Novak alleges that because her employer's action adversely affected her, CSEA was statutorily required to appeal to step III of the grievance procedure as was promised by CSEA's step II representative.

Novak's exceptions in this last regard reflect a misunderstanding regarding a union's duty of fair representation. A union does not have an absolute duty to appeal adverse

grievance determinations despite a grievant's demand.[1/] Nor does a union's duty of fair representation prevent it from evaluating the merits of a grievance appeal despite promises or assurances of such an appeal made earlier during the processing of the grievance, particularly when those promises or assurances are made by persons who are not responsible for the appellate determination.[2/] Its statutory duty is to refrain from conduct which is arbitrary, discriminatory or in bad faith.[3/]

The allegations in the charge evidence only that Novak's employer may have led her to believe that she was permanent in a higher position. The "promotion" Novak believes she had received from her employer was dependent upon a position reclassification by the Civil Service Commission, a reclassification which was denied. Actions were apparently taken by Novak's employer based upon assumptions which were not fulfilled because of the decision by the Civil Service Commission denying a reclassification. CSEA's decision not to appeal the Article 22.2 grievance because it did not believe that the employer's acknowledged mistakes and errors violated the collective bargaining agreement is not one which can be considered arbitrary, discriminatory or in bad faith. As such, the Director was correct in dismissing this aspect of the charge.

[1/] Garvin v. PERB, 168 A.D.2d 446, 23 PERB ¶7023 (2d Dep't 1990).

[2/] Local 1655, Dist. Council 37, AFSCME, 25 PERB ¶3008 (1992) (reconsideration of grievance appeal permissible).

[3/] Public Employees Fed'n (Reese), 29 PERB ¶3027 (1996).

For the reasons set forth above, the Director's decision is affirmed and the exceptions are denied.

IT IS, THEREFORE, ORDERED that the charge must be, and it hereby is, dismissed.

DATED: June 19, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

PUBLIC EMPLOYEES FEDERATION and MELVYN MEER,

Charging Parties,

-and-

CASE NO. U-15615

STATE OF NEW YORK (DEPARTMENT OF LABOR),

Respondent.

JOHN DILLON, for Public Employees Federation

MELVYN MEER, pro se

WALTER J. PELLEGRINI, GENERAL COUNSEL (RICHARD W. McDOWELL of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Melvyn Meer[1/] to a decision of an Administrative Law Judge (ALJ) dismissing a charge that the State of New York (Department of Labor) (State) violated §209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) by discriminating against Meer and terminating him from his position as an ALJ[2/] with the State Unemployment Insurance Appeals Board (UIAB) for his exercise of rights protected by the Act.

[1/]The Public Employees Federation (PEF) is also a charging party but it has not filed any exceptions to the ALJ's decision.

[2/]Meer's official title was unemployment insurance referee, but the position is referred to in the record as an ALJ.

The ALJ found that Meer had been denied appointment as a permanent employee and terminated from his provisional appointment because of his poor job performance and not for any exercise of protected rights. Meer has filed numerous exceptions to the ALJ's decision, arguing that the ALJ committed errors of fact and law. The State supports the ALJ's decision.

After a review of the record and consideration of the parties' arguments, we affirm the decision of the ALJ.

Meer was provisionally appointed by the State as an ALJ with the UIAB in Brooklyn on May 28, 1991. As with the other ALJs appointed at the same time, Meer participated in a three- to four-week training program, consisting primarily of lectures on the substantive law, evidence, due process and decision writing. The ALJs were initially assigned to the UIAB's appeals section. There, Meer drafted both long- and short-form decisions for issuance by UIAB members on appeals from decisions of the UIAB's hearing ALJs. Meer received two performance evaluations while he was assigned to the appeals section. Both rated him as "effective" and contained positive remarks by his supervising ALJ, Margaret O'Brien, as to the thoroughness of his decisions and his steady improvement during his first year at the UIAB.

In late June or early July 1992, Meer and several other ALJs were transferred to the UIAB's hearing section. That section hears appeals from initial determinations made concerning unemployed workers' eligibility for unemployment insurance benefits. As a hearing ALJ, Meer conducted several hearings each

day of approximately thirty minutes duration each day. The hearings were tape recorded and Meer issued a written decision after the close of the record. The ALJs received little formal training in the conduct of administrative hearings before being assigned to a full calendar of cases.

O'Brien continued as Meer's immediate supervisor.[3/] During the period from August to September 1992, Meer received six memoranda from O'Brien in which she criticized his hearing and decision work. On January 12, 1993, Meer received his first evaluation of his performance as a hearing ALJ during the period May 28, 1992 to November 27, 1992. While his rating remained "effective", due in part to his assignment for part of the rating period to the appeals section, O'Brien noted that Meer had problems in both his manner of conducting hearings and in rendering his written decisions. O'Brien did note, however, that Meer had shown some improvement after being advised of these shortcomings. Meer responded in writing that his mistakes should be seen as a reasonable consequence of his training, which was one of "error and correction".

Between March 1 and March 17, 1993, O'Brien met with Meer several times about complaints that had been filed with the Chief Administrative Law Judge by three litigants who had appeared before Meer and had taken issue with his remarks about their representative. On March 17, 1993, Meer received a formal

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[3/]ALJ James Bretton initially supervised Meer for two months.

counselling memorandum as a result of O'Brien's investigation of the litigants' complaints.[4/] Meer filed a grievance on March 29, 1993, in which he alleged that O'Brien had lied in the counselling memorandum, that she was being prosecutorial and that any improprieties he had committed were the result of his lack of training.

The grievance was denied at step 1 by Timothy Coughlin, executive director of the UIAB, who concluded that the record established that Meer had made inappropriate remarks and that, therefore, the counselling memorandum was justified. Meer appealed the determination to step 2. After a hearing, the step 1 determination was upheld in a decision issued June 18, 1993. O'Brien continued, from March until September 1993, to send Meer memoranda in which she noted problems with his conduct of hearings and his decisions. Meer received another counselling memorandum from O'Brien about his demeanor in September 1993. In May 1993, Meer was also counselled by another senior ALJ, Ronald Moss, who was not his direct supervisor, for remarks he had made which indicated to Moss a lack of understanding about the basic principles of practice before the UIAB and due process

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[4/]The memorandum deals with the remarks Meer made about the complainants' representative, his handling of an adjournment request during one of the proceedings, and his attitude and demeanor both at the hearings and during his discussions with O'Brien.

requirements.[5/] Meer filed a grievance on May 6, 1993, in response to the memoranda.[6/] On June 25, 1993, Coughlin denied the grievance at step 1. Coughlin thereafter withdrew the Moss counselling memorandum from Meer's file, based upon Meer's acknowledgment at the step 2 hearing that he had, in fact, received training in due process requirements and as part of the settlement of other PEF grievances.

In September 1993, Meer filed another grievance, alleging that Coughlin had assigned him to several travel days to the UIAB's offices in Hauppauge, in retaliation for his earlier grievances. Thereafter, Meer's grievance and the grievances of other hearing ALJs related to travel assignments were withdrawn based on Coughlin's agreement with PEF to conduct another travel survey to ascertain travel preferences. The results of the new survey were not implemented until February or March 1994.[7/]

[5/]Pursuant to two lawsuits, referred to by the parties as the "MLC" lawsuits, filed against the UIAB in the late 1970's, the UIAB and the individual ALJs are permanently enjoined to comply with minimum due process requirements, as set forth in the original lawsuit, relating to the introduction of evidence, examination of witnesses, review of initial determinations, expeditious hearings and processing of appeals. The terms of the MLC lawsuits were the subject of lectures Meer and other new ALJs attended as part of their initial training.

[6/]Meer filed a grievance on May 7 also, alleging that he needed time off to work on his other grievance. That grievance was denied at all stages, as confirmed in the step 3 decision issued on February 28, 1994.

[7/]Coughlin testified, and the ALJ so found, that the new travel schedule was not implemented immediately because the UIAB was in the process of making permanent ALJ appointments in the Fall of 1993 and Coughlin was not sure who of the current ALJs would be remaining.

Meer's performance evaluation for the period November 1992 through May 1993 noted that his overall performance had not improved and, in some areas, had gotten worse.[8/] In November 1993, a number of ALJs, including Meer, who held provisional appointments became eligible for permanent appointment. O'Brien and Coughlin discussed Meer's performance, with O'Brien recommending that Meer not be retained. On January 11, 1994, Coughlin formally advised Meer that he was not being offered a permanent appointment and that his last day of work would be January 26, 1994. Thereafter, Meer filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging that he was being discriminated against because of his age, fifty-five. Subsequently, he also filed this improper practice charge.

Meer's exceptions can be characterized in essentially two ways: he excepts to the ALJ's credibility resolutions and he alleges errors by the ALJ in making his rulings. After a careful review of the record, we find no basis to disturb any of the ALJ's credibility resolutions. In several instances, the ALJ credits the testimony of Coughlin and O'Brien rather than Meer and, Meer's disagreement with these findings notwithstanding, the ALJ's resolutions are fully supported by the record.

The procedural exceptions are numerous and require further comment. In his exceptions, Meer alleges that he never received

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[8/] O'Brien mentioned in Meer's evaluation that he had scored 83% in the federal quality appraisal requirements, which was down from his last review period in which he had scored 86%. She also referred to a problem in dealing with ex parte communications.

a performance evaluation for the period May through December 1993. He further alleges that O'Brien told him in the summer of 1993 that his work had improved and that his performance evaluation would reflect that. The record, however, establishes only that O'Brien acknowledged to Meer that his work had increased, not improved. While Meer might have expected an evaluation in December 1993, in November 1993 Coughlin and O'Brien were discussing which of the ALJs would be made permanent and which would lose their provisional appointments. As a result, no performance evaluations were completed for that period. Meer also alleges that he never received any warnings of possible termination even though other ALJs had received such warnings prior to their termination. O'Brien's stated position (which the ALJ credited) was not to threaten employees with loss of employment in her corrective or counselling memoranda, although she did caution them about the possibility of further, or more severe, discipline, as she did with Meer. That some other senior ALJs did use termination as a threat in counselling memos issued to the ALJs under their supervision does not establish, as Meer alleges, that he received disparate treatment in this regard. His exceptions as to these matters are accordingly denied.

Meer takes exception to the ALJ's handling of PEF's requested subpoenas for performance evaluations for the other hearing ALJs hired in the spring of 1991 and federal quality appraisals of those ALJs for the period of July 1992 through

January 1994. He alleges that the subpoenas were not complied with and that the materials presented pursuant to the subpoenas were not in the form requested. We need not analyze the subpoenas and the documents submitted by the State pursuant thereto because, on the record, both Meer and the PEF representative agreed that the State had complied with the subpoenas.[9/] Meer also alleges that the ALJ violated an agreement, pursuant to this stipulation, that he would not rely on Meer's federal quality appraisal scores in reaching his decision because, in the rendition of the facts in his decision, he refers to the fact that O'Brien listed Meer's federal quality appraisal scores in his performance valuation. The ALJ was merely reciting the facts and his decision does not rely on Meer's scores to support his final determination.

In his exceptions, Meer also alleges that the ALJ erred in failing to consider that the rate of reversals and/or remands of his decisions by the UIAB was one of the lowest of the hearing ALJs. Meer testified that he had only had two reversals/remands during the time he was a hearing ALJ.[10/] However, Meer also

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[9/]Meer alleged that he had been compelled to agree in order to avoid further delays in the hearing. While the State did indicate that it was considering seeking to quash PEF's subpoenas if the modifications it sought were not acceptable to PEF and Meer, there is no evidence in the record to support Meer's allegation that he was somehow coerced.

[10/]Meer also alleges that the ALJ erred by improperly limiting the evidence he sought to introduce in support of this contention. However, the only limitation apparent on the record is the ALJ's action in sustaining an objection as to the relevancy of Meer's statement that a senior ALJ told him that one of the reversals was, in his opinion, unjustified.

testified that there was a significant lapse of time between the issuance of an ALJ's decision and the decision of the UIAB on appeal. As a result, not many of his cases had been reviewed by the UIAB prior to his termination. Furthermore, no comparison is made to the reversal/remand rates of the other hearing ALJs. The significance of Meer's "low" remand/reversal rate is accordingly not established.

The ALJ's findings as to the number, and relative merit, of the grievances filed by the hearing ALJs at the UIAB are excepted to by Meer. Any error in this regard is not material, however, because the number of grievances, even if many, and whether meritorious or not, cannot, in and of itself, establish an employer's anti-union animus.

Meer also excepts to the ALJ's reference to a letter he sent to the Director of Public Employment Practices and Representation (Director), during the pendency of his hearing, questioning PERB's and the ALJ's handling of PEF's subpoena request. Meer did not direct the inquiry to the ALJ and he did not copy the State or PEF on his letter. The ALJ, in discussing Meer's performance evaluations and counselling memoranda in his decision, noted that Meer was characterized by O'Brien and Moss as having a problem with ex parte communications, which was further evidenced, the ALJ found, by his ex parte communication with the Director at PERB. We need not decide if Meer's contact with the Director was an ex parte communication or whether it supported a finding that O'Brien was accurate in her assessment of his "difficulties" in this regard. The record evidences that

Meer was counselled by O'Brien and Moss for engaging in one-sided communications with parties in matters pending before him. These communications were of particular concern because of the two MLC lawsuits. O'Brien testified that communications by a party to a supervising ALJ, complaining about a hearing ALJ or asking a procedural question, were not uncommon at the UIAB, but that the hearing ALJs were clearly prohibited from one-sided communications with the litigants. The parties focused on only one incident, raised by the Moss counselling memorandum, as illustrative of Meer's problems, although his difficulties in this regard were also mentioned in his second performance evaluation as a hearing ALJ. The record, without consideration of Meer's contact with the Director, amply supports the ALJ's conclusion that Meer's problem with ex parte communications was only one of the several legitimate concerns the State had with Meer's performance throughout his tenure as a hearing ALJ.

Finally, Meer's exceptions contain allegations that the ALJ erred in ruling on certain objections, the admission of evidence and the order of questioning by Meer or the PEF representative. Meer's exceptions as to these issues either misstate the record, take statements out of context or generally misrepresent what occurred at the hearing.[11/] For those reasons, these exceptions are denied.

[11/]For example, Meer alleges that the ALJ precluded him from asking questions when he was one of the charging parties and was appearing pro se. However, the record indicates that the parties agreed that either Meer or the PEF representative would ask questions of each witness and that it was usually Meer who questioned the witnesses and made objections.

The record amply supports the ALJ's finding that Meer was not offered a permanent appointment because he was counselled several times on his deficiencies as a hearing ALJ and he had failed to correct virtually all of these deficiencies. Indeed, many of Meer's performance problems, as identified in the counselling memoranda, preceded Meer's first grievance. The ones that continued after he began filing grievances simply expanded upon the grounds set forth in the initial memoranda: Meer's deficiencies in making a record, in making rulings, in issuing decisions and in maintaining an appropriate judicial demeanor toward the litigants. Thus, the timing of events supports the conclusion that the protected activity of filing grievances followed and resulted from Meer's performance problems rather than causing them, as Meer contends.

Further, there is no evidence of any union animus on the part of O'Brien or Coughlin. The counselling Meer received, his evaluations and the disposition of his grievances provide no basis to conclude that O'Brien or Coughlin were improperly motivated. There is nothing in the record that establishes that Meer's grievances were atypical or particularly controversial and they provide no basis by themselves upon which to conclude that O'Brien or Coughlin harbored any ill will toward Meer because of them. Additionally, other ALJs who had received counselling memoranda (although in smaller number) and who had filed grievances in response have been made permanent.

For the reasons set forth above, Meer's exceptions are denied and the decision of the ALJ is affirmed.

IT IS, THEREFORE, ORDERED that the charge must be, and it hereby is, dismissed.

DATED: June 19, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CITY OF CORTLAND,

Charging Party,

-and- **CASE NO. U-16843**

CORTLAND PAID FIRE FIGHTERS ASSOCIATION, LOCAL 2737, IAFF, AFL-CIO,

Respondent.

HITSMAN, HOFFMAN & O'REILLY (JOHN F. O'REILLY of counsel), for Charging Party

BLITMAN & KING (CHARLES E. BLITMAN and WILLIAM D. PERUN of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions and cross-exceptions[1/] filed, respectively, by the Cortland Paid Fire Fighters Association, Local 2737, IAFF, AFL-CIO (Local) and the City of Cortland (City) to a decision by the Assistant Director of Public Employment Practices and Representation (Assistant Director) in a scope of negotiation dispute. The City charged that the Local violated §209-a.2(b) of the Public Employees' Fair Employment Act (Act) by submitting nonmandatory subjects of negotiation to compulsory interest arbitration pursuant to §209.4 of the Act.

[1/]Those portions of the Local's appeal papers which are denominated as its response to the City's response to the Local's exceptions have not been considered. The response to the City's response was not requested or authorized pursuant to §204.11 of our Rules of Procedure.

The Local excepts to the Assistant Director's determination that its proposal 4 is nonmandatory. The City excepts to the Assistant Director's determination that the Local's proposals 5, 9, the first and second paragraphs of 16, 17B and 17E are mandatory subjects of negotiation.

LOCAL'S EXCEPTIONS

PROPOSAL 4

> Due Process for Bargaining Unit employees, - In handling day-to-day operations of the Fire Department, the Chief may determine it is necessary to inquire of bargaining unit employees information necessary to provide proper instruction and/or guidance in their fulfilling firefighting/code enforcement duties and responsibilities. The purpose of such an inquiry is not disciplinary in nature but rather to allow, among other things, casual resolution of job issues. Such inquiries are to be encouraged and bargaining unit employees are to participate in these. However, to the extent these inquiries give raise [sic] to discipline or otherwise effect [sic] the employment of the bargaining unit employees, the "due process" requirements currently existing in the contract shall be triggered. Such due process rights shall include, but not be limited to (1) the bargaining unit employee being paid straight time when ordered to discuss an incident with the Chief during off hours; (2) the bargaining unit employee shall be informed immediately of the nature of the investigation before questioning commences and sufficient information shall be provided to the employee at the commencement of the questioning to reasonably appraise [sic] the employee of the facts and circumstances involved in the incident; and (3) the [Local] shall be advised sufficiently in advance of the questioning to allow its representative to be present.

The Assistant Director held this proposal to be nonmandatory because he considered that its first three sentences did not address any terms and conditions of employment. Finding that part of the proposal to be prefatory in nature, and one not

severable from the rest of the demand, he held the entire demand nonmandatory.

The Local argues in its exceptions that the first part of its demand does not relate to nonmandatory subjects of negotiation, but, if so, it is severable from the rest of the proposal, such that it should not be considered a unitary demand.

The Assistant Director properly treated proposal 4 as a unitary demand. The language after the first three sentences incorporates by reference those first sentences such that the proposal cannot be reasonably comprehended without its introduction. The negotiability of the proposal, therefore, must be assessed according to the proposal as submitted. In that regard, the Local argues alternatively that the first three sentences of this demand, like the rest of it, cover mandatory subjects of negotiation, not the City's mission.

For precisely the reason that proposal 4 is a unitary demand, the first three sentences can only be considered in the context of the entire demand. When read in that relevant context, we find the first three sentences to be as mandatorily negotiable as the rest of the demand of which they are an inseparable part.

The demands which have been found nonmandatory as prefatory are those which did not seek to settle some aspect of a term and condition of employment. Rather, they reflected general affirmations of mutual responsibility intruding upon matters beyond the employment relationship such as service to the

community[2/] or the quality of education.[3/] Moreover, in each of the cited cases involving prefatory demands, the prefatory language was in the form of a general preamble to the collective bargaining agreement.

Proposal 4 is a demand regarding the due process rights of unit employees when undergoing employment-related questioning by their employer which is either for the express purpose of disciplinary action or when that questioning could lead to disciplinary action. Each of the first three sentences is directly related and gives meaning to that term and condition of employment as they simply clarify when the due process rights thereafter set forth do not attach. By defining or exemplifying a type of questioning which is not for a disciplinary purpose, each sentence individually, and all collectively, settle an aspect of employer-employee communication. We hold proposal 4 to be a mandatory subject of negotiation.

CITY'S EXCEPTIONS

PROPOSAL 5

> The City shall provide legal counsel for the defense of a member of the [Local], at no expense to the member against whom a complaint, charge or claim is filed, arising out of an incident in the line of duty within the Cortland Fire Department and/or Code Enforcement Office, except for internal discipline of a bargaining unit employee.

[2/] Schenectady Patrolmen's Benevolent Ass'n, 21 PERB ¶3022 (1988).

[3/] Onondaga Community College Fed'n of Teachers, 11 PERB ¶3045 (1978); Orange County Community College and County of Orange, 9 PERB ¶3068 (1976).

The Assistant Director held this demand mandatory on the basis of our decision in Albany Police Officers Union, Local 4821,[4/] in which the same type of demand was held mandatorily negotiable.

The City claims that this demand is nonmandatory because defense/indemnification in criminal proceedings goes beyond the employment relationship even though the proceeding arises from a line-of-duty incident. But so too can an employer's defense/indemnification of an employee in a civil proceeding stemming from a line-of-duty incident, a demand which the City admits is mandatorily negotiable. These types of demands are mandatorily negotiable because they are essentially ones for compensation/legal insurance. By the negotiation of such demands, employees seek insulation from financial liability stemming from proceedings instituted against them for actions taken in the line of duty. The Local's demand being a form of employment-related compensation, and there being no public policy or other prohibition against the negotiation of such a proposal, it is a mandatory subject of negotiation.

PROPOSAL 9

> Verbal Orders Being Reduced to Writing - The parties tentatively agreed upon reducing to writing all administrative verbal orders within 96 hours to written form. The orders shall have the proper authorized signatures and shall be posted for a period of not less than 30 days for bargaining unit employees' review and education. All general and special orders shall follow the same criteria.

[4/] 16 PERB ¶3068 (1983).

The Assistant Director held that this proposal merely specified the form for work rules and that it did not prohibit the issuance of any such rules.

The City argues that the demand cannot be restricted to work rules, with or without disciplinary sanction, although so limited by the Local in its brief to the Assistant Director, because it covers by its terms "all" verbal orders, including general and special orders.

In Rochester Fire Fighters, Local 1071,[5/] a broader demand was held mandatory on the ground that the form of an order issued to an employee, regardless of the substance of that order, relates to potential discipline. The rationale was that employees are entitled to negotiate for a written confirmation of any orders given them because noncompliance with an order can lead to discipline. We affirm the Assistant Director's determination that because proposal 9 does not prohibit or restrict the issuance of any orders, it is a mandatory subject of negotiation, even if it is not as limited as the Assistant Director interpreted it to be.

PROPOSAL NO. 16

> Job Openings/Posting Vacancies - When an opening/ vacancy exists within the City of Cortland Fire Department/Code Enforcement Office, The Fire Chief shall post an opening/vacancy notice on the [Local] Bulletin Board at least 30 days prior to filling said vacancy.
>
> Further the City shall be required to maintain an eligibility list of candidates for hiring and/or promotional opportunities for all bargaining unit positions of the Cortland Fire Department/Code

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[5/] 12 PERB ¶3047 (1979).

> Enforcement Office. As a minimum testing shall be held in accordance with the periodically published testing schedules within the New York State Civil Service Law.

The Assistant Director held the first paragraph of this demand to be mandatory because the posting procedures do not "unduly delay" the City from filling vacancies. He held the second paragraph mandatory as a demand relating to procedures, not position qualifications. Responding to the City's alternative argument, the Assistant Director held that the second paragraph of the demand did not simply reiterate existing statutory requirements.

The City argues that the first paragraph of this proposal requires it to wait thirty days before filling any vacancy and this waiting period interferes with its right to carry out its responsibility to operate an effective fire department.

The job posting proposal in the first paragraph of this demand is not simply a procedural notice provision. The demand prevents the City from filling any job vacancy in the fire department by any means for any reason for a period of thirty days. We find this demand to be nonmandatory even if it is read to apply only to unit positions.

Although we have indicated that job posting proposals can be mandatorily negotiable,[6/] nothing in any of our decisions suggests that all job posting demands are in that category of

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[6/]Schenectady Patrolmen's Benevolent Ass'n, supra. In that case, however, we did not have a specific job posting proposal for review.

negotiability. Demands requiring the filling of vacancies are nonmandatory because they prevent an employer from exercising its managerial prerogatives regarding staffing levels.[7/] We see no material difference between demands which require the filling of a vacancy and ones which prevent the filling of a vacancy under all circumstances without exception for a defined period of time. Both prevent an employer from implementing a staffing decision. An employer's decision to increase staffing is a managerial prerogative to the same extent and for the same reasons the decision to decrease staffing by not filling vacancies is not mandatorily negotiable. Both relate to and affect an employer's level of service to the public.

Without deciding whether a more narrowly drawn job posting proposal would be mandatorily negotiable, we hold that this one is overly broad in that it applies to all positions under all circumstances without articulated exception for a period of time arguably sufficient to interfere with staffing determinations necessary to public safety and departmental operations. We find it, therefore, to be a nonmandatory subject of negotiation.

The Assistant Director held the second paragraph of proposal 16 mandatory upon the conclusion that the required maintenance of a civil service eligibility list concerns only hiring/promotional procedures, not qualifications. The City disputes this conclusion. It argues that the proposal restricts

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[7/] Scarsdale Police Benevolent Ass'n, Inc., 8 PERB ¶3075 (1975); City of Albany, 7 PERB ¶3079 (1974).

its clear managerial right to determine hiring and promotional criteria and qualifications because it requires the City to test prior to hiring or promoting without exception.

We need not decide whether the Local's demand is reasonably susceptible to the interpretation given it by the City because we find it to be nonmandatory for a different reason. It is axiomatic that a duty to bargain is premised upon and presupposes employer power over the subject sought to be bargained. When that power resides exclusively in another entity which is beyond the employer's control, there can be no legal duty to bargain. The City as employer has no control over the creation or continuing maintenance of civil service lists or the scheduling of civil service examinations. Those are matters within the exclusive jurisdiction of the appropriate civil service commission acting pursuant to requirements of the Civil Service Law.[8/] Whether the demand is characterized as procedural or substantive is immaterial because the City does not control the subject matter of the demand no matter its characterization.

PROPOSAL NO. 17B

> Temporary assignment of Code certified firefighters to the Code Enforcement Office will be on a 30 calendar day rotating bases [sic], using the Fire department seniority system, (lowest to highest in seniority).

The Assistant Director held this demand mandatory. He determined that the reference to "code certified" meant and

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[8/] City of Rochester, 12 PERB ¶3010 (1979) (demand within the jurisdiction of the civil service commission nonmandatory).

ensured that the employees had all been determined to be qualified for assignment to the Code Enforcement Office. Therefore, the assignment of such qualified personnel by seniority was mandatorily negotiable.

The City argues that the demand is nonmandatory because it makes seniority the sole criterion for a job assignment, thereby depriving it of any right to determine qualifications for the assignment. We disagree with this argument. If the code certification process is given any meaning at all, all persons possessing the certification must be deemed to possess all of the qualifications necessary for code enforcement. Assignment by seniority, therefore, does not divest the City of any right to fix job qualifications.

The City argues alternatively that this demand is nonmandatory because it interferes with the City's right to assign code enforcement work to fire fighters. The demand, however, does not prevent the City from assigning such work to fire fighters. To the contrary, it contemplates that such work will be assigned to fire fighters. The demand would merely determine which of several qualified fire fighters will be assigned the work for a period of time. The City's right to assign duties inherent to a position to the incumbents of that position does not exempt it from a duty to negotiate the distribution of that work among the several qualified incumbents in the manner proposed by the Local.

PROPOSAL NO. 17D

All bargaining unit employees assigned to the Code Enforcement Office shall be off duty on the following holidays. Bargaining unit employees shall receive one additional day off, of the employee's choice.

New Years Day	Labor Day
Columbus Day	Martin Luther King Day
Memorial Day	Independence Day
Christmas Day	Lincoln's Birthday
Washington's Birthday	Veteran's Day
Thanksgiving Day	

The City argues that the Assistant Director's holding that this demand for holiday leave is mandatory, "strips the City of its ability to provide code enforcement services" on those days. According to the City, the demand is nonmandatory because it prevents it from being able to provide a service on those days.

The subject matter of the demand is paid time off from work, clearly and admittedly a mandatory subject of negotiation. However, this particular demand is nonmandatory because it arguably prevents service delivery on designated days. The record does not disclose whether only unit employees staff the Code Enforcement Office. From the unexplained face of this demand and demand 16, it appears that the Code Enforcement Office is staffed at least primarily, if not exclusively, by unit employees. The employees in that office are the ones who are responsible for the delivery of code enforcement services. This demand makes all of those persons unavailable to the City should it elect to provide code enforcement services on a holiday because it specifically requires them to be "off duty". To this extent, this broadly worded leave proposal, which leaves the City

without apparent means to staff for delivery of service on given days, is not different from other types of time off proposals held to be nonmandatory as an interference with an employer's right to fix staffing levels.[9/]

For the reasons set forth above, the Assistant Director's decision is reversed regarding the Local's proposals numbered 4, 16 and 17D and otherwise affirmed. The Assistant Director's order requiring the Local to withdraw proposal 4 from arbitration is rescinded; the dismissal of the charge entered as to proposals 16 and 17D is reversed and the Local is hereby ordered to withdraw proposals 16 and 17D from arbitration; in all other respects, the Assistant Director's order is affirmed.

DATED: June 19, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

[9/] Patrolmen's Benevolent Ass'n of Newburgh, New York, Inc., 18 PERB ¶3065 (1985) (employees selected personal days off); City of Yonkers, 10 PERB ¶3056 (1977) (number of employees on vacation at any given time).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SCHALMONT TEACHERS ASSOCIATION, NYSUT, AFT, AFL-CIO, LOCAL 4856,

Charging Party,

-and- **CASE NO. U-16784**

SCHALMONT CENTRAL SCHOOL DISTRICT,

Respondent.

KEVIN BERRY, for Charging Party

HANCOCK & ESTABROOK, LLP (JOHN F. CORCORAN of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Schalmont Teachers Association, NYSUT, AFT, AFL-CIO, Local 4856 (Association) to a decision of an Administrative Law Judge (ALJ) dismissing its charge that the Schalmont Central School District (District) had violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it denied a request by the Association's president and vice-president to attend the annual New York State United Teachers Lobby Day, thereby changing unilaterally a long-standing past practice.

At both the beginning of the hearing before the ALJ and at the close of the Association's case, the District moved to dismiss the charge for lack of subject matter jurisdiction, alleging that the charge involved only a contractual dispute.

The ALJ reserved decision on the motions. The District thereupon rested without calling any witnesses. The ALJ denied the District's motions in his decision, finding that the parties' collective bargaining agreement did not cover the matter in dispute and that, in any event, the agreement had expired at the time the action which forms the basis of charge was taken. Nevertheless, the ALJ dismissed the charge, finding no change in any past practice.

The Association excepts to the ALJ's findings in defining the parties' practice, while the District supports the ALJ's decision.

Based upon our review of the record and consideration of the parties' arguments, we affirm the decision of the ALJ.

The Association established that, at least for ten years, its president, Michael Foley, had requested permission to attend the Lobby Day in Albany and that the District superintendent had approved the request.[1/] Foley's absence while at Lobby Day was not charged to any of his accrued leave time. In 1995, Foley once again requested permission to attend Lobby Day. His request was approved by his building principal but was denied by the acting superintendent.[2/] Foley, rather than utilize any of his personal leave time, did not attend Lobby Day and instead reported to work.

[1/]Foley testified that he had been accompanied to Lobby Day by Jean Duxbury, the vice-president of the Association.

[2/]Duxbury's request was also denied.

To establish the alleged §209-a.1(d) violation, the Association has the burden of establishing an unequivocal practice with respect to that mandatory subject, that had existed for a substantial period of time and that had reasonably been expected by unit employees to continue unchanged.[3/] Union leave time is a mandatory subject of negotiation.[4/] However, the unequivocal practice asserted by the Association is not the practice as established by the record evidence. The Association claimed that the practice was an unrestricted right to attend Lobby Day. However, the practice, as defined by the Association's only witness, Foley, was that for over ten years he requested permission to attend Lobby Day and that the superintendent, exercising his unrestricted right to do so, granted his request. Foley did not merely notify the superintendent of the date of Lobby Day and advise him that he would be attending, he requested permission to attend. The practice, therefore, is permission to attend Lobby Day with approval, not an entitlement to attend simply upon notice; and that practice has not changed. Foley requested permission to attend Lobby Day. The acting superintendent exercised his discretion to deny Foley's request and there is nothing in the record to show that the exercise of that discretion was restricted, conditioned or waived. Although the superintendent

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[3/] County of Nassau, 24 PERB ¶3029 (1991).

[4/] Local 2561, AFSCME, AFL-CIO, 23 PERB ¶3054 (1990).

for many years gave his permission for Foley to attend Lobby Day, this did not by itself create a practice entitling Foley to the day unconditionally or divest the superintendent of his right to exercise his discretion each time such a request was made.[5/]

Based on the foregoing, the Association's exceptions are denied and the decision of the ALJ is affirmed.

IT IS, THEREFORE, ORDERED that the charge must be, and it hereby is, dismissed.

DATED: June 19, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

[5/] Public Employees Fed'n v. PERB, 195 A.D.2d 930, 26 PERB ¶7008 (3d Dep't 1993).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SHERIFF OFFICERS ASSOCIATION, INC.,

Charging Party,

-and-

CASE NO. U-16618

CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 1000, AFSCME, AFL-CIO, NASSAU LOCAL 830 and COUNTY OF NASSAU,

Respondents.

LYNCH & TOSCANO, P.C. (THOMAS A. TOSCANO of counsel), for Charging Party

NANCY E. HOFFMAN, GENERAL COUNSEL (JEROME LEFKOWITZ of counsel), for Respondent CSEA

BEE, EISMAN & READY (HOWARD B. COHEN of counsel) for Respondent County of Nassau

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Sheriff Officers Association, Inc. (SOA) to a decision by an Administrative Law Judge (ALJ) on a charge it filed against the Civil Service Employees Association, Local 1000, AFSCME, AFL-CIO, Nassau Local 830 (CSEA) and the County of Nassau (County). SOA alleges that CSEA violated §209-a.2(a) of the Public Employees' Fair Employment Act (Act) and that the County violated §209-a.1(a) and (b) of the Act when they continued negotiations regarding revisions to a memorandum of agreement (MOA) after they

knew that SOA had filed a representation petition by which it sought to replace CSEA as the bargaining agent for a substantial portion of the Sheriff's department employees who are currently in CSEA's unit.

The ALJ dismissed the charge without a hearing pursuant to CSEA's and the County's motions. The ALJ held that CSEA and the County had the right to continue negotiations regarding the MOA because the MOA constituted a contract bar to SOA's petition, all of the conditions stated in the MOA, including "approval" by the County Executive, having been satisfied before the SOA's petition was filed.[1/] Accordingly, SOA's petition did not and could not raise a bona fide question concerning representation (QCR). The ALJ concluded, therefore, that CSEA and the County were entitled to undertake negotiations regarding questions arising under the terms of the MOA.

SOA argues in its exceptions that the ALJ erred in concluding that the MOA barred its petition because the MOA was not signed and it was not approved by the County Executive pursuant to the requirements of local law. As the MOA did not bar its petition, CSEA and the County violated the Act by continuing their negotiations after they knew that the representation petition had been filed. SOA argues further that

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[1/]The representation petition was filed with the Nassau County mini-PERB. By split decision issued in late May 1996, the mini-PERB dismissed the petition as untimely on the ground that the MOA barred SOA's subsequently filed petition.

at the very least there are questions of fact raised in its offer of proof sufficient to preclude dismissal of its charge on motion.

CSEA and the County each argue that the ALJ's decision is correct. They claim that the County Executive did sign and approve the MOA through agents authorized under the Act and local law. Therefore, the ALJ properly held that the MOA barred the petition.

For the reasons set forth below, we affirm the ALJ's dismissal of the charge.

The following facts are not in dispute and they form the basis for our affirmance of the ALJ's decision. CSEA and the County reached the MOA on June 30, 1994. The MOA was signed by Anthony Russo, the County's Commissioner of Labor and its Director of Labor Relations, and Peter A. Bee, the County's Special Labor Counsel. Several persons signed on behalf of CSEA, including the Local's president, CSEA's assigned collective bargaining specialist, and members of CSEA's negotiating team. The last paragraph of the MOA subjects the MOA to ratification and/or approval as follows:

> It is expressly understood that the foregoing is subject, in all respects, to approval by the CSEA negotiating committee, ratification by the CSEA membership, approval by the County Executive and ratification by the Nassau County Board of Supervisors.

It is admitted that CSEA approved and ratified the MOA in July 1994. It is further admitted that the County Board of

Supervisors ratified the MOA by resolution on August 1, 1994. SOA's petition was not filed until January 19, 1995.

The ALJ correctly recognized that the disposition of this charge hinges upon whether SOA's petition raised a bona fide QCR. This is an issue clearly related to but distinct from the question of whether SOA's petition was "timely" under the rules of the Nassau County mini-PERB.[2/] Therefore, no question is presented here as to whether we are bound by a mini-PERB's finding of fact or conclusion of law made during the processing of a case within its jurisdiction.

If SOA's petition raised a bona fide QCR, as we have defined it, then CSEA and the County were thereafter barred from negotiating.[3/] If the petition did not raise a bona fide QCR, then CSEA and the County, as parties to an unchallengeable bargaining relationship, were free to exercise their bargaining rights and to fulfill their bargaining obligations.

SOA argues that its representation petition raised a bona fide QCR because the MOA did not bar that petition. Two reasons

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[2/]A hypothetical variation of the facts will illustrate the distinction. The mini-PERB might possibly have held the petition timely under its own substantially equivalent contract bar principles. However, applying our own contract bar principles in the disposition of the improper practice charge, we could still dismiss the charge on the ground that the petition did not raise a bona fide QCR.

[3/]Our dismissal of the charge makes it unnecessary for us to decide whether CSEA and the County were engaged in the type of negotiations our case law is intended to prohibit, absent consent of all affected parties, after a bona fide QCR has been raised.

are advanced in support of that theory: that the County Executive did not sign the MOA and that he did not approve it prior to the date the representation petition was filed.

As to SOA's first reason, although our decisions require a contract to be signed by both union and employer if it is to constitute a bar to a petition, nothing in any of those decisions holds or suggests that the document asserted to constitute the bar must bear the signature of either the union's or the employer's chief executive officer. Both parties can and often do negotiate through designated agents who are empowered and required upon demand to sign the agreement negotiated on behalf of their principal. Russo's and Bee's signatures on the MOA on behalf of the County fully satisfied the signature requirement of our contract bar rule. Any provision of local law requiring the signature of the County Executive himself as a condition to the existence, validity or enforceability of any form of collective bargaining agreement would be fundamentally inconsistent with controlling provisions of the Act. Those provisions of local law, to that extent, would be invalid and State law would control.[4/] Therefore, even if local law required the MOA to be signed personally by the County Executive, or by a deputy specifically designated for the purpose, that would not serve to negate the bar to the petition raised under the Act by the MOA.

[4/]Doyle v. City of Troy, 51 A.D.2d 845, 9 PERB ¶7510 (3d Dep't 1976).

As to the second ground, SOA argues that the signature of Robert L. Olden, the Deputy County Executive, at the end of the legislative resolution approving the MOA merely served to put the resolution into effect pursuant to and as required by §107 of the County charter.[5/] SOA steadfastly maintains, however, that Olden's signature putting the legislative resolution into effect merely satisfied the condition stated in the MOA regarding legislative ratification and that his signature did not and could not satisfy the separate requirement stated in the MOA that the County Executive approve the MOA. We hold for the reasons set forth below that the condition regarding the County Executive's approval of the MOA was either satisfied apart from Olden's approval of the legislative resolution or it was waived.

The MOA is completely silent regarding the form of the County Executive's required approval. As the terms of the MOA control the approval, it must be concluded that the parties intended and understood that the approval did not have to be manifested in any specific way or by any overt act, such as the County Executive's signature on the MOA. Even assuming Olden's signature upon the legislative body's resolution was for the

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[5/]That section requires the County Executive to approve all ordinances or resolutions, other than those relating to procedure, before those legislative actions can take effect. It is admitted by all parties that the Deputy County Executive has been properly empowered to approve resolutions on behalf of the County Executive under §205 of the County Charter.

limited purpose asserted by the SOA,[6] the very submission of an agreement to a legislative body for its ratification presupposes as a matter of law that the agreement satisfies all stated conditions which a public employer must meet. In Jamesville-Dewitt Central School District,[7] we held that legislative ratification of an agreement can occur only after negotiations have ended and the representatives of the chief executive officer have reached an agreement with their union counterparts. The County's legislative body could not have conducted a ratification of the MOA consistent with the requirements of Jamesville-Dewitt unless the County Executive had previously approved it. Moreover, as a matter of practical inquiry, if the County Executive had not earlier approved the MOA, then what was before the legislative body for its ratification? The SOA does not offer an answer to this question. It is clear to us that the Board of Supervisors had to be ratifying an agreement between CSEA and the County Executive. Were we to accept SOA's argument that the County Executive had not approved the MOA by the date of the Board of Supervisors' resolution, we would have to conclude that the legislative body engaged in both a meaningless and a legally ineffective act, one which was then immediately approved by the County Executive's own deputy. We find nothing in SOA's

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[6]We do not, therefore, express any opinion as to whether Olden did approve the MOA on behalf of the County Executive or whether he had the power to do so under local law.

[7]22 PERB ¶3048 (1982).

offer of proof or anywhere in the record to warrant such a conclusion.

Even were we to accept SOA's argument that the County Executive's affirmative approval of the MOA was not granted prior to the date its petition was filed, that condition was waived by the County Executive as a matter of law.

The approval condition placed in the MOA reserved to the County Executive a right to disapprove the MOA even though the MOA had been entered into on his behalf by his designated agents. The County Executive would not have had the right to disapprove the MOA had it not been for this specific reservation of right under mutual agreement. That right of disapproval, however, had to be exercised within a reasonable period of time or not at all. Otherwise, the County Executive would hold a perpetual veto over implementation of the terms of the MOA.

The MOA was legislatively approved on August 1, 1994, having been approved and ratified earlier by CSEA. There is no allegation that at any time between August 1, 1994, and January 19, 1995, when SOA's petition was filed, the County Executive or any of his agents did or said anything to disapprove the MOA or to disassociate themselves from its terms. Indeed, SOA itself acknowledges that the County implemented at least some of the terms of the MOA as of January 1, 1995, before the representation petition was filed.

In summary, the County Executive's approval of the MOA was either granted or that condition was waived before SOA filed its petition. As the MOA satisfies all elements of our contract bar doctrine, the petition SOA filed with the mini-PERB did not raise a bona fide QCR. Therefore, that petition did not require CSEA or the County to cease any negotiations regarding the MOA or any question arising thereunder.

For the reasons set forth above, SOA's exceptions are denied and the ALJ's decision is affirmed.

IT IS, THEREFORE, ORDERED that the charge must be, and it hereby is, dismissed.

DATED: June 19, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO,,

Petitioner,

- and -

CASE NO. C-4422

TOWN OF PENFIELD,

Employer.

NANCY E. HOFFMAN, GENERAL COUNSEL (MIGUEL ORTIZ of counsel), for Petitioner

BERNARD WINTERMAN, for Employer

BOARD DECISION AND ORDER

On May 23, 1995, the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (petitioner) filed, in accordance with the Rules of Procedure of the Public Employment Relations Board, a timely petition seeking certification as the exclusive representative of certain employees of the Town of Penfield (employer).

Thereafter, the parties executed a consent agreement in which they stipulated that the following negotiating unit was appropriate: Included: Clerk III with Typing, Clerk II with Typing, Account Clerk with Typing, Senior Account Clerk, Assistant Recreation Director, Senior Recreation Supervisor, Recreation Supervisor, Assistant Assessor, Real Property Appraiser, Real Property Appraiser Trainee, Program Analyst, Cable TV Coordinator, Fire Marshall, Building Inspector, Assistant Building Inspector, Assistant Building/Code Compliance Inspector, Administrative Assistant, Telephone Operator, Graphic Information System Operator, Court Clerk, Deputy Town Clerk/Receiver of Taxes, Town Historian (P.T.), Payroll Clerk (P.T.), Local History Room Coordinator (P.T.),

Secretary Planning/Zoning (P.T.), Assistant Fire Marshall (P.T.), Clerk III with Typing (P.T.) and Account Clerk with Typing (P.T.).

Excluded: Assessor, Recreation Director, Director of Finance, Director of Public Works, Superintendent of Sewer Maintenance, Director of Planning, Zoning & Building Services, Director of Parks & Facilities, Town Clerk/Receiver of Taxes, Deputy Director of Planning, Zoning & Building Services, Deputy Director of Public Works, Junior Engineer, Building Inspector Aide, Youth Referral Counselor, Recreation Leader, Receptionist, and all other employees.

Pursuant to that agreement, a secret-ballot election was held on April 24, 1996, at which a majority of ballots were cast against representation by the petitioner.[1/]

Inasmuch as the results of the election indicate that a majority of the eligible voters in the unit who cast ballots do not desire to be represented for the purpose of collective bargaining by the petitioner, IT IS ORDERED that the petition should be, and it hereby is, dismissed.

DATED: June 19, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

1/ Objections to the election, which were filed on May 1, were withdrawn by the petitioner on May 24.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TEAMSTERS LOCAL 264, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Petitioner,

-and-

CASE NO. C-4511

TOWN OF ROYALTON,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the Teamsters Local 264, International Brotherhood of Teamsters has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All full-time and regular part-time employees in the water/sewer and highway departments.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Teamsters Local 264, International Brotherhood of Teamsters. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: June 19, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED PUBLIC SERVICE EMPLOYEES UNION LOCAL 424, A DIVISION OF UNITED INDUSTRY WORKERS DISTRICT COUNCIL 424,

Petitioner,

-and-

CASE NO. C-4500

ONEIDA-HERKIMER-MADISON BOCES,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the United Public Service Employees Union Local 424, A Division of United Industry Workers District Council 424 has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: Account Clerk-Typist, Account Clerk, Audio Visual Clerk, Audio Visual Aide, Audio Visual Repair Technician, Automotive Mechanic, Building Maintenance Worker, Cleaner, Clerk, Clerk Typist, Courier, Custodian, Data Processing Control Clerk, Graphics Aide, Groundsperson, Groundsman/Maintenance, Heavy Equipment Operator, Laborer, Library Assistant, Mechanic, Micro Film Operator, Micro Computer/AV Equipment Repair Tech, Micro Computer Operator, Motor Vehicle Operator, Offset Duplicating Machine Operator, Photo

Typesetting Machine Operator, Printing Aide, Printing Assistant, Program Assistant, Public Information/Public Relations Assistant, Science Center Aide, Secretary to the Dean of Students, Senior Clerk, Senior Typist, Senior Stenographer, Senior Account Clerk, Stenographer, Storekeeper, Telephone Operator, Typist, Word Processing Equipment Operator.

Excluded: All other employees, including, but not limited to Confidential Secretary to the Superintendent, Confidential Secretary to the Assistant Superintendent for Administrative Services, Confidential Secretary to the Assistant Superintendent for Instruction, Confidential Secretary to the Director of Personnel/Human Resources, Senior Account Clerk/Treasurer, Senior Typist/Certification Liaison, Human Resources Clerk, and Senior Account Clerk/Budget-COSERS.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the United Public Service Employees Union Local 424, A Division of United Industry Workers District Council 424. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: June 19, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member